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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. [redacted] 145

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, et al.,
Petitioners,

vs.

BANKERS TRUST COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari issue to review the decision of the Court of Appeals entered on 24 August 1960 which reversed the decision of the District Court.

OPINIONS BELOW

The District Court opinion is unreported and is submitted herewith as part of the Transcript of Record (pp 121-128). The Court of Appeals opinion is reported at 282 F2 106 and is included as Appendix A hereof.

JURISDICTION

The opinion and judgment of the Court of Appeals were dated and entered on 24 August 1960 (Appendices A and B). Timely petition for rehearing was denied on 20 March 1961 (Appendix C) and mandate issued on 27 March 1961. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES INVOLVED

No statutes are involved in this petition.

QUESTIONS PRESENTED

1. Is a fire insurance policy a contract, or is it a commodity?

2. Can a party who has enforced by judgment a written fire insurance policy without seeking reformation, thereafter maintain a separate fraud action based on the assertion that the terms of the policy enforced were not the terms to which he agreed?

STATEMENT

Respondent's building was covered by 4 fire insurance policies issued by petitioners in the total face amount of $290,000. Each policy provided for payment of actual cash value of property destroyed, which value in event of dispute was to be fixed by appraisal.

Respondent's building was totally destroyed by fire. Pursuant to the policy terms and to a post-loss agreement

between respondent and petitioners, appraisal proceedings were commenced. Respondent sued petitioners in Nevada court and obtained an order appointing an umpire. The appraisal award fixed the actual cash value of the building, and respondent's loss under the policies, at $175,000. Respondent then reactivated the earlier Nevada action, praying for an order confirming the appraisal award and for judgment on it; a judgment was thereupon entered against petitioners in the amount of the appraisal award ($175,000). Petitioners paid the judgment in full, receiving and filing satisfactions thereof.

Six month later, respondent filed the present action in Nevada state court seeking recovery of an additional $115,000 (the difference between the $175,000 paid by petitioners under the earlier judgment and the $290,000 face amount of the policies), plus other amounts (chiefly interest items) not relevant to this petition. This action was based on the assertion, *then made for the first time*, that the insurance contract which respondent had enforced by judgment was not really the true contract between the parties because petitioners had orally represented that they would pay, in event of total loss, the full face amount of the policies without appraisal.

The second action was removed by petitioners on diversity grounds (28 USC 1441) to the United States District Court for Nevada. The District Court entered summary judgment for petitioners, holding that respondent's prior judgment on the appraisal award barred the present action.

Respondent thereupon appealed to the Court of Appeals.

In its appeal briefs respondent characterized its case as sounding either in contract for breach of warranty or in tort for fraud. On oral argument, respondent for the first time abandoned its contract claim. The Court of Appeals conceded that the action would be barred if based on contract, but held that it was saved by the "fraud" label applied to it. Accordingly, the judgment of the District Court was reversed.

REASONS FOR GRANTING THE WRIT

The decision entails far-reaching and adverse effects on the finality of judgments on written contracts in general and on fire insurance policies in particular. These effects are such that no judgment on a written contract or fire policy can henceforth be regarded as final, since the party enforcing the contract or policy in the first instance is given by the opinion the right to bring a subsequent action labeled "fraud" based on the assertion that the contract or policy which he has used the judicial process to enforce was not a contract but a contrivance. This result is reached by reasoning from a false premise on the nature of fire insurance policies and then deriving "rules" which are presented as applicable to all written contracts.

I. THE OPINION RESTS ON THE PREMISE, DIRECTLY CONTRARY TO THE PRONOUNCEMENTS OF THIS COURT, THAT A FIRE INSURANCE POLICY IS NOT A CONTRACT BUT A COMMODITY.

This Court has consistently taken the position that fire insurance policies are contracts and not commodities having independent intrinsic value:

> "• • • [P]olicies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter. These contracts • • • are not subjects of trade and barter offered in the market as having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded • • • and then put up for sale."
>
> *Paul v Virginia* (1869) 8 Wall (US) 168, 183;
>
> *US v SE Underwriters Assn* (1944) 322 US 533, 543, n 17.

The opinion's erroneous premise is reflected in its description of the case:

> "• • • [A]ppellant commenced an independent action • • • based on alleged fraud in the misrepresentation by appellees to appellant of the *value of the policies.*" Appendix A, p ii. [Emphasis added.]

This error is compounded by the opinion's reliance on cases involving misrepresentation of value of physical property to support the conclusion that respondent could sue on the policies as written and bring a later action for fraud (analogous, per the opinion, to keeping the property received and suing for the difference between its actual value and the value as represented).

At a later point, the opinion recognizes that the alleged misrepresentations did not concern the "value" of the policies but their terms:

> "• • • [T]he policies were represented to be 'valued' policies which would pay the full face amount ($290,000) in case of total destruction, whereas they actually provided for paying only the actual cash

value of the property at the time of loss." Appendix A, p ii.

While the opinion thus observes that the alleged misrepresentations concerned what the policies "actually provided for", the holding is based on analogy to misrepresentation of the value of tangible physical property. This analogy is fundamentally unsound if a fire insurance policy, *as this Court has held*, is properly regarded as a contract rather than a commodity.

II. NOT ONLY IS THE DECISION BASED ON A FALSE PREMISE AS TO THE NATURE OF A FIRE INSURANCE POLICY, BUT THE OPINION FAILS TO SPECIFY ITS PREMISE AND PURPORTS TO MAKE GENERAL LAW IN THE FIELD OF CONTRACTS. IN THIS RESPECT, THE DECISION SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The opinion violates the fundamental policy of the law that a party shall not recover successive judgments based on inconsistent and conflicting facts.

The opinion's emphasis on legal labels has seriously obscured the basis of the doctrine of election of remedies.

> "• • • [T]he so-called 'inconsistency of remedies' is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of a certain remedy is inconsistent with, and repugnant to another state of facts relied on as the basis of another remedy."
>
> 18 *Am Jur* 135, Election of Remedies §12.

The question of whether respondent's present action is consistent with its prior suit to enforce the policies as

written cannot be resolved by mechanical application of legal labels such as "fraud", "reformation" or "contract". The use of these labels merely begs the question of whether the *facts* now asserted by respondent are consistent with the *facts necessarily asserted* in its prior action.

If a policy of fire insurance is a contract, the act of enforcing that contract as written has a clearly-recognized meaning:

> "One who asks the enforcement of a written contract without reformation does not seek replacement of any of the words written therein. Instead, *he asserts that they properly express the meaning that he had and the meaning to which the other assented.*"
>
> 3 *Corbin on Contracts* 54, §540. [Emphasis added.]

Thus, when respondent sued to enforce the policies as written and with full knowledge of all material facts, respondent represented to the Nevada court that the written policies represented the contract which respondent had and to which it had assented.

The present action proceeds on directly contrary factual assertions. The opinion states these assertions as follows:

> "• • • [T]he policies were represented to be 'valued' policies which would pay the full face amount ($290,000) in case of total destruction, whereas they actually provided for paying only the actual cash value of the property at the time of loss."
>
> Appendix A, p ii.

> "• • • [T]he loss was complete before the alleged fraud was discovered."
>
> Appendix A, p ix.

If respondent in fact relied on the misrepresentations alleged, it could not possibly have agreed to the written provisions which it previously sued to enforce. Its present allegations are that it consented only to a "valued" policy without appraisal requirements, that it did not even know the contents of the policies as written and *could not* have assented to them. Thus, there is a fundamental *factual* inconsistency between respondent's prior position and the position on which it now seeks to predicate *additional* recovery.

B. The same factual inconsistency which would bar respondent from maintaining the present action for reformation must with equal force bar a "fraud" action based on identical facts and bearing only a different legal label.

The opinion concedes that *a suit to reform the policies would be barred,* but ignores the basis of the rule stated, even though such basis is clearly stated in cases which the opinion cites:

> "The general rule is that a party cannot assume successive positions in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory."
>
> *Royal Ins Co v Stewart* (1921) 190 Ind 444, 129 NE 853, 857; Cited by the Court in Appendix A, at p iv.

Thus the rule that an action on a written contract bars a later action for reformation of the same contract is simply a particular application of the general principle against permitting litigants to assume inconsistent factual positions in successive actions.

While the opinion recognizes that a present reformation action would be barred, it has also been conceded by everyone concerned that *respondent's present fraud allegations would originally have supported a suit for reformation of the policies.*[1] Under Nevada law, the legal basis for such reformation is stated to be:

> "* * * [C]ourts of equity have the power to order the reformation of * * * instruments, when, through mistake of the parties thereto, or through the fraud of one of the parties, or unconscionable conduct amounting to fraud, such instrument *does not contain the real terms of the contract between them.*" *Wainwright v Dunseath* (1923) 46 Nev 361, 211 P 1104, 1106. [Emphasis added.]

Since the facts on which the present fraud action is based would also establish that the policies did "not contain the real terms of the contract", it follows that these facts must be inconsistent with the assertion implicit in originally enforcing the policies as written, namely that they represented the actual agreement between respondent and petitioners.

The above conclusion is supported by the fact that in every case[2] relied on by the Court of Appeals to derive the "rule" that a suit on a contract is not inconsistent with a later action for fraud in inducing the contract, the facts of the case were such that *reformation would not have been available to the defrauded party at any*

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[1]Appendix A, p iv; BRIEF FOR APPELLANT in the Court of Appeals, p 9; BRIEF FOR APPELLEES in the Court of Appeals, pp 22, 25.

[2]These cases are cited at footnote 1 of p vi of Appendix A.

stage of the proceedings. This is because the true rule is that one may affirm a fraudulently induced contract and later sue for the fraud only in cases where the fraud is *collateral* to the contract, where the facts on which the fraud claim is based do not negate the very terms of the contract affirmed. Thus the New York Court of Appeals early noted that affirmance of a fraudulently induced contract by a defrauded party "does not thereby release or waive his claim for damages arising from a fraud *collateral to the agreement.*" (*Whitney v Allaire* (1848) 1 Comstock (NY) 305, 312. Quoted with approval in *Williamson v Clapper* (1948) 88 CalApp2 645, 199 P2 337, 342-343. Emphasis added.)

The conclusion of the Court of Appeals that a present reformation action would be barred is thus seen to be correct. This is not, however, because a reformation action would bear a "contract" label, but rather because of the fundamental factual inconsistency between enforcing a contract as written, on the one hand (as was done in the first suit), and claiming that the contract enforced was not the contract agreed to, on the other (as is being attempted in the instant suit).

This factual inconsistency must with equal force bar a fraud action based on identical facts and bearing only a different legal label. To hold otherwise would not only work inestimable injury to the finality of judgments on written contracts in general, but would particularly injure the conduct of the business of fire insurance.

Over 20 million fire policies are written annually in the United States, of which over 1 million are written in

the State of California alone.[3] The opinion has a potential effect on each and every one of these policies. Under the holding an insurer who pays a judgment on a fire policy does so *at its peril,* subject always to the now newly-proclaimed right of the insured to bring a later action claiming that the policy which he enforced was not the policy to which he agreed.

The enormous scope and impact of the decision as precedent in future cases and the injustice which it works in the present case indicate the need for review by the Supreme Court.

Respectfully submitted,

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May 1961

(Appendices A, B and C Follow.)

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[3]Source: Inter-Regional Insurance Conference Study, 1960. (The policies in suit were written in California, though covering on Nevada property.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

BANKERS TRUST COMPANY, a Corporation, *Appellant*, vs. PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation, and THE CENTURY INSURANCE COMPANY, LIMITED, a Corporation, *Appellees.*	No. 16,620 Aug. 24, 1960

Appeal from the United States District Court
for the District of Nevada

Before: STEPHENS, ORR and MERRILL, Circuit Judges

ORR, Circuit Judge:

Appellant acquired from appellees four policies of fire insurance securing the owner of the Bankers Trust Building in Reno, Nevada, against loss by fire. On or about February 5, 1957, the said building was totally destroyed by an explosion and fire, while the said insurance policies were in full force and effect. The policies had a face value of $290,000, but by specific terms contained in the policies recovery was limited to the actual cash value of the property. Further provisions were to the effect that the

award, obtaining judgment, and accepting payment thereof constitute an election of remedies barring this action. (2) Said actions constitute a waiver by the appellant of any right to claim any amount in excess of the $175,000 already paid. (3) Said actions estop the appellant from claiming any amount in excess of the $175,000 already paid. (4) The judgment obtained in the Nevada court barred any subsequent action to recover added sums for the same loss. (5) This action is barred by the limitation of action provisions in the policies sued upon.

The parties apparently agree that appellant's earlier action in the state court amounted to a suit to enforce the insurance contracts and their appraisal provisions as written. Appellant says the instant suit may be considered either as an action in tort, for deceit, or as an action in contract, for breach of warranty. However, in oral argument before this court, appellant abandoned the contract contention. An action in contract would require first reforming the contract to include the alleged "face value" provision, and then enforcing such provision. It is clear that such an action is barred, both by the limitation of action provisions in the insurance policies, and by the rule which provides that one who sues on a contract as it is may not later bring a second suit to reform the same contract, since such suits are inconsistent. See Royal Insurance Co. v. Stewart, 190 Ind. 444, 129 N.E. 853 (1921); Leaksville Light & Power Co. v. Georgia Casualty Co., 193 N.C. 618, 137 S.E. 817 (1927). The trial court's order granting summary judgment against the so-called action in contract was correct, but the entry of a summary judgment insofar as the alleged tort is concerned was error.

This being a diversity case removed from a Nevada state court, the law of that state is to be applied to the basic issues presented in this appeal.

Election of Remedies

Where a party who has been injured has a choice of two remedies "so inconsistent that the assertion of one involves the negation or repudiation of the other", a deliberate choice of one with full knowledge of the facts will bar a later attempt to assert the other in a second suit. Barringer v. Ray, 72 Nev. 172, 178, 298 P. 2d 933, 936 (1956). Accord State v. Justice Court of Reno Tp., 46 Nev. 133, 207 Pac. 1105 (1922); Robertson v. Robertson, 43 Nev. 50, 180 Pac. 122 (1919). However, this doctrine of election of remedies applies only to choosing between different remedies allowed by law on the same state of facts, where the party has but one cause of action, one right infringed, one wrong to be redressed. "The doctrine does not require election between distinct causes of action arising out of separate and distinct facts." 28 C.J.S. 1065, El. of Rem. §3(b) (1st ed. 1941). Accord 18 Am. Jur. 135, El. of Rem. §11 (1st ed. 1938). It is the law that one who has been fraudulently induced into a contract may elect to stand by that contract and sue for damages for the fraud. When this happens and the defrauding party also refuses to perform the contract as it stands, he commits a second wrong, and a separate and distinct cause of action arises for the breach of contract. The same basic transaction gives rise to distinct and independent causes of action which may be consecutively pursued to satisfaction. "Thus, an action on a contract induced by fraud is not

inconsistent with an action for damages for the deceit; . . . ." 18 Am. Jur. 139, El. of Rem. §14 (1st ed. 1938). "A right of action on a contract and for fraud in inducing plaintiff to enter into such contract may exist at the same time, and a recovery on one of the causes will not bar a subsequent action on the other." 50 C.J.S. 121, Judgments §676 (1st ed. 1947). The courts of many states have recognized the rule that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action, with separate and consistent remedies.[1]

The two actions which appellant has instituted are entirely consistent, one with the other. Each admits and affirms that the written insurance policies are the actual contract between the parties. If a defrauded party is to be allowed to keep the contract and sue for the fraud, the right to keep the contract must include the right to enforce that contract if the other party refuses to perform it. Refusing to perform the contract is a separate wrong from fraudulently inducing it. There is nothing inconsistent in the respective remedies sought for the respective wrongs allegedly committed.

Res Judicata

A judgment on the merits by a proper court operates as a bar not only as to every matter offered and received

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[1]Bohn v. Watson, 130 Cal. App. 2d 24, 278 P.2d 454 (1954); Union Cent. Life Ins. Co. v. Scheidler, 130 Ind. 214, 29 N.E. 1071 (1892); Chester-Neal Co. v. Generazzo, 20 N.J.Misc. 296, 26 A.2d 876 (1942); France & Canada S.S. Corp. v. Berwind-White Coal Mining Co., 229 N.Y. 89, 127 N.E. 893 (1920); Modern Industrial Bank v. Landwehr, 112 N.Y.S.2d 36 (1952); Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947); Oben v. Adams, 89 Vt. 158, 94 Atl. 506 (1915); Barth v. Loeffelholtz, 108 Wis. 562, 84 N.W. 846 (1901).

to sustain or defeat the claim, but as to every other matter which might, with propriety, have been litigated and determined in that action. Wolford v. Wolford, 65 Nev. 710, 200 P. 2d 988 (1948). However, res judicata requires identical causes of action. Reno Club v. Harrah, 70 Nev. 125, 260 P. 2d 304 (1953); Weisheyer v. Weisheyer, 54 Nev. 76, 6 P. 2d 439 (1932); Silverman v. Silverman, 52 Nev. 152, 283 Pac. 593 (1930); Smith v. Gray, 50 Nev. 56, 250 Pac. 369 (1926). The test of a cause of action for res judicata purposes is the identity of facts essential to maintaining the two suits; if the facts show only one right of the plaintiff and one wrong by the defendant involving that right, there is only one cause of action.[2] The narrow bounds within which the Nevada Supreme Court has applied the doctrine of res judicata appear in Carey v. Musgrave, 72 Nev. 31, 292 P. 2d 1066 (1956). In that case the plaintiff had helped the defendant buy a ranch and round up and sell the cattle on it. In 1949 he sued to establish a partnership in the ranch and for an accounting, but he lost on the issue of proof. He then brought suit for the value of his services. The court held that the second suit was not barred by res judicata, saying: "It is not enough, however, that the same circumstances and transactions have, in general, given rise to both cases." 72 Nev. at 34.

Appellant allegedly had two separate causes of action: it had a right to sue to have the contract performed and

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[2]Reno Club v. Harrah, supra; City of Reno v. Fields, 69 Nev. 300, 250 P. 2d 140 (1952); Miller v. Miller, 54 Nev. 44, 3 P. 2d 1069 (1931); Silverman v. Silverman, supra. Accord Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927); U.S. v. Pan American Petroleum Co., 55 F. 2d 753, 781 (9th Cir. 1932); Restatement of Judgments, §61 (1st ed. 1942).

a right to seek recovery for any fraud which induced the contract. Entirely different facts are essential to maintaining the two suits. The former required proof of the contract, appellant's performance thereof and appellees' failure to perform: the instant suit requires proof of fraud in the inducement of the contract.

From what we have said it is apparent that there is no estoppel by judgment here.

Waiver

The trial court found that the appellant had waived his right to claim any amount in excess of the amount recovered under the contract. To sustain a waiver of the tort action for fraud, it would be necessary to find either an intentional waiver or a waiver implied by law. An intentional waiver does not appear in the record upon which summary judgment was entered. The complaint and the supporting affidavit of Henry Girola both set out that appellant has at all times claimed the face value of the policies and refused to sign a release of any additional liability. If intention to waive is to be implied from conduct, the conduct should speak the intention clearly. Reno Realty & Investment Co. v. Hornstein, 72 Nev. 219, 301 P. 2d 1051 (1956).

In support of a waiver implied by law, the appellees rely on Benz v. Zobel, 255 Wis. 542, 39 N.W.2d 713 (1949). In that case the plaintiff entered into a contract to farm the defendant's land with defendant's machinery, plaintiff to receive 40% of the profits and to pay 40% of the maintenance, etc. on the machinery. The defendant al-

legedly represented that the machinery was in good condition, whereas actually it was not; the court there found that the plaintiff discovered this either immediately or shortly after starting performance, and before any loss or expense resulted from the machinery's poor condition. However, in that case plaintiff nevertheless performed the whole contract and entered into another contract with the defendant before bringing suit for fraud. The Wisconsin court said that in so doing plaintiff indicated his intention to stand by the contract and waive all right of action for the fraud. No such intentional waiver is indicated in the instant case. Another theory advanced in the Benz case is that the plaintiff having discovered the fraud before any injury resulted therefrom, his own act in continuing to perform the contract was basically responsible for the subsequent loss, and thus he was deemed to have waived the fraud. Again that element is not present here. In the instant case the appellant had fully performed the contract and the loss was complete before the alleged fraud was discovered. The injury occurred when the building was destroyed with only replacement-cost instead of face-value insurance coverage. At that point the appellant had several alternative remedies available, and its choice of the two-step remedy was not a waiver of the fraud. Some courts have held that continuing to perform a wholly or partially executory contract after discovering a fraud is a waiver of that fraud, although this is a minority rule. See 13 A.L.R. 2d 807 ff. (1st ed. 1950). However, the courts asserting the minority rule have not held that a plaintiff waives a fraud by enforcing a contract which he has fully performed before discovering the fraud.

Estoppel

It is contended that appellant's actions in enforcing the contract estop it from bringing this action. "[Estoppel in pais] holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury." 19 Am. Jur. 642, Estoppel §42 (1st ed. 1939); see Noble Gold Mines Co. v. Olson, 57 Nev. 448, 66 P. 2d 1005 (1937); Beck v. Curti, 56 Nev. 72, 45 P. 2d 601 (1935). An acceptance of a portion of that to which a party is entitled, unless by way of compromise and settlement or accord and satisfaction, is not a bar to the subsequent assertion of a claim for the rest, especially where acceptance is accompanied by a reservation of the remaining rights, or it is manifest that the party doesn't intend to surrender them. 19 Am. Jur. 690, 692 ff., Estoppel §64 (1st ed. 1942); Biel v. Godwin, 69 Nev. 189, 245 P. 2d 997 (1952). The appellant was entitled to enforce the insurance policies as they stood and to bring a separate action for the alleged fraud. There is nothing in the record before us setting forth what, if anything, appellant did by bringing the first action to cause appellees to believe it would not bring this second action; to the contrary, appellant's pleadings and affidavit state that it demanded the full amount and refused to sign a release of all liability after the first judgment. There is no basis for estoppel in pais in this case, and the same reasons we have given in rejecting the claim of estoppel apply in holding that appellees' claim of accord and satisfaction is without merit.

Limitation Provision of Policies

The policies contain a provision which states, "No suit or action on this policy for the recovery of any claim shall be sustainable . . . unless commenced within twelve months after inception of the loss." While this clause is sufficient to bar appellant's alleged contractual remedy (reformation and suit on the contract), this action in tort for deceit in inducing the contract is not an action on the contract. See White v. Barrow (1916 Tex. Civ. App.), 182 S.W. 1152. In an action for deceit the parties' rights are not controlled by the terms of the contract, and an attempt by a contract to restrict the remedy of a party for fraud of the other party which induced the making of the contract is ineffectual. 37 C.J.S. 353, 354, Fraud §64 (1st ed. 1943); see Lyman v. Romboli, 293 Mass. 373, 199 N.E. 916 (1936).

The statute of limitations for fraud in Nevada is three years. Nevada Revised Statutes, §11.190(3)(d) (1959). Appellees assert that appellant's claim should nevertheless be barred by laches. However, the Nevada Supreme Court, in Lang Syne Mining Co. v. Ross, 20 Nev. 127, 18 Pac. 358 (1888), in referring to the three year statute for fraud said, "It is very clear that mere lapse of time, not extending beyond the period fixed in the statute of limitations for commencement of the suit, constitutes no bar to the action." 20 Nev. at 140. See also Cooney v. Pedroli, 49 Nev. 55, 235 Pac. 637 (1925).

We conclude that this case should not be disposed of by summary judgment on the issues of law presented by the motion therefor.

REVERSED

(Endorsed) Opinion Filed Aug. 24, 1960.

Frank H. Schmid, Clerk.

Appendix B

United States Court of Appeals
For the Ninth Circuit

BANKERS TRUST COMPANY, a corporation,
Appellant,

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, et al.,
Appellees.

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Nevada.

On consideration whereof, It is now ordered and adjudged by this court, that the judgment of said District Court in this cause be and hereby is reversed with costs in favor of the appellant and against the appellees.

It is further ordered and adjudged by this court that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

(ENDORSED) FILED
Filed and Entered Aug. 24, 1960
Frank H. Schmid, Clerk

Appendix C

United States Court of Appeals
For the Ninth Circuit

Excerpt from Monday, March 20, 1961

Before: Stephens, Orr, and Merrill, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellees, filed Sept. 21, 1960 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.